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# Supreme Court of the United States

## OCTOBER TERM, 1950

No. 489

BOARD OF ZONING APPEALS OF THE TOWN OF HEMPSTEAD and ROBERT C. RICHTER, CHARLES G. KANE, WALTER G. MICHAELIS, W. KENNETH CHAVE and CHARLES B. GREGORY, the Members thereof

*—and—*

RICHARD W. BARNES,

*Petitioners,*

*—against—*

SUSAN H. CLARK, NATHAN H. CHERWIN, WALTER E. SWANSEN, RUTH SWANSEN, MIRIAM R. PHILLIPS, JOHN E. HAHN, DOROTHY HAHN, MICHAEL LIEBL and MABEL LIEBL,

*Repondents.*

# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement

Petitioner Barnes applied to the Board of Zoning Appeals of the Town of Hempstead for a variance of the zoning ordinances to permit him to erect a funeral parlor in a residentially zoned area which prohibited such use.

The power to grant such variance is given to the Board by virtue of Section 267 of the Town Law and is limited to those cases in which there exists "practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinances—so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." The Board granted the variance and the Court of Appeals reversed such finding on the ground that petitioner had failed to establish unnecessary hardship and practical difficulties peculiar to himself, as required by the statute and decisions interpreting the same.

## Comments on Petitioners' Summary Statement

The petition states that, in close proximity to the Barnes' property, there is located a church, rectory, school, convent and the homes of two physicians. These are all residential B conforming uses under the ordinance.

The remainder of the property completely surrounding the Barnes' property also zoned residential B is improved with owner occupied one-family homes of the better type and there is no non-conforming use in the entire section known as Cathedral Gardens. R. 78.

Upon the hearing before the Board of Zoning Appeals, 238 property owners in the immediate community objected to the granting of the variance. R. 109. Only one resident, the pastor of the local church, spoke in its favor.

The majority of the real estate experts, produced on both sides, admitted that the erection of an undertaking establishment would adversely affect the value of surrounding property. R. 51, 64, 65, 79, 80.

The property immediately to the west, the owner of which was referred to as not objecting, has since been improved by the erection of a conforming one-family residence.

## POINT I

**There was not drawn in question the validity of any statute, nor was any federal question raised or decided.**

No constitutional question was raised in the entire proceeding up to final judgment and determination in the Court of Appeals. Thereafter, the petitioners made a motion for a rehearing, or, in the alternative, for the amendment of the remittitur to show whether or not a constitutional question was necessarily decided. This motion was denied without opinion. R. 153. Nowhere in the record does it appear that the petitioners challenged the validity of a statute or maintained that the denial of a variance would deprive Barnes of property rights in contravention of the Fourteenth Amendment. The attempt to raise this question on a motion for a rehearing came too late. *Gelkon Realty Corporation* v. *Young Women's Hebrew Association*, 296 U. S. 537; *Rooker* v. *Fidelity Trust Company*, 261 U. S. 1114; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179; *St. Louis and San Francisco Railroad Co.* v. *Sheperd*, 240 U. S. 240.

## POINT II

**The petitioner, Barnes, failed to meet the requirements necessary to obtain a variance and the Court below properly reversed the determination of the Board of Zoning Appeals.**

The entire issue related to whether or not the petitioner, Barnes, had proved the necessary grounds upon which a variance could be granted by the Board, in accordance with the requirements of the statutes and decisions of the State of New York. In the prevailing opinion, it is stated that the basis for the Court's findings was the failure of petitioner, Barnes, to establish practical difficulties and unnecessary hardship, special and peculiar to himself.

The petitioners rest their application for a writ on the case of *Nectow* v. *Cambridge*, 277 U. S. 183, cited in the court below only as an authority in support of the contention that the Court could not substitute its judgment for that of the local board. This question became academic when the Court of Appeals held that there was insufficient evidence under the statutory requirements to constitute a basis for an affirmative determination.

The *Nectow* case, *supra*, involved the validity of an ordinance which had been passed on in the courts below. There the zoning ordinance was enacted while Nector was the owner of the property and the line, excluding his property from the unrestricted area, was irregular and appeared from the map to be discriminatory. The facts in the present case were quite different. Barnes acquired the property long after the

enactment of the ordinance. The separation of the business from the residential area was regular and uniform and according to a definite plan which zoned property on Hempstead Turnpike for business use and extended such area back 100 feet. Barnes' property was not even adjacent to the business area but 70 feet back in the residential zone.

## CONCLUSION

**The petition itself and the foregoing respondents' brief both show that the case presented makes no ground for the isssuance of a writ of certiorari. It is respectfully submitted that the petition should be dismissed.**

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